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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1357

BARBARA COLEMAN, *Petitioner,*

v.

COMMONWEALTH OF VIRGINIA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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The petitioner Barbara J. Coleman respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Va. entered in this proceeding on January 23, 1978.

JURISDICTION

The judgment of the Supreme Court of Va. was entered on January 23, 1978. A timely petition for rehearing was denied on March 3, 1978, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under the provisions of the Fifth, Sixth and Fourteenth Amendments to the U.S. Constitution.

QUESTION PRESENTED

Whether the evidence against petitioner was sufficient to show that she embezzled petty cash funds from her employer. If not, petitioner was wrongfully convicted in violation of her rights under the Fifth, Sixth and Fourteenth Amendments to the U.S. Constitution.

STATUTORY PROVISION INVOLVED

Section 18.2-111 Code of Virginia, 1950, as amended.
Embezzlement and Fraudulent Conversion
Embezzlement deemed larceny; indictment; Statement from attorney for the Commonwealth.

If any person wrongfully and fraudulently uses, disposes of, conceals or embezzles any money, bill, notes, check, order, draft, bond, receipt, bill of lading or any other personal property tangible or intangible which he shall have received for another or for his employer, principle or bailiff or by virtue of his office, trust or employment, or which shall have been entrusted or delivered to him by another or by any court, corporation or company he shall be deemed guilty of larceny thereof and may be indicted as for the larceny, and proof of embezzlement under this section shall be sufficient to sustain the charge. On the trial of every indictment for larceny however, the defendant if he demands it shall be entitled to a statement in writing from the attorney for the Commonwealth designating the statute he intended to rely upon to ask for conviction. Code 1950 18.1-109 (1960) Ch. 358 1975 cc 14, 15.

STATEMENT OF THE FACTS

Petitioner, Barbara Coleman, was convicted of two counts of grand larceny embezzlement in Criminal Numbers C-11, 302 and C-11, 303 after a jury trial in Arlington County Circuit Court.[1] Upon her convictions of the above two

[1] The indictment in C-11, 302 read that between the dates of April 1, 1975 and September 30, 1975, . . . Barbara Coleman did wrongfully and fraudulently use, dispose of, conceal or embezzle money having a value of $100.00 or more, which she had received for her employer by virtue of her employment by Amsod of Arlington, Inc., trading as Arthur Murray School of Dancing of Arlington—a violation of Section 18. 1-109, Code of Virginia, 1950, as amended. The indictment in C-11, 303 read the same, except the dates for the period of the alleged embezzlment were from October 1, 1975 to March 2, 1976. Also, the violation alleged was Section 18. 2-111, Code of Virginia, 1950, as amended.

charges, she was sentenced to imprisonment for six months and a $1000.00 fine for each charge. It is from these two convictions that petitioner takes this appeal.

References will be to the transcript made before the trial court (Tr.).

The main witness for the prosecution was Lee Sims, the President of the Arthur Murray Studio. He testified that during the period covered by the two indictments, Barbara Coleman worked for the studio as a bookkeeper. (Tr. 3-5). He described her duties as "taking care of the books . . . and whatever was to be done, whatever was to take to Silver Spring." (Tr. 5). She was also responsible to take care of the "petty cash and the cash box." (Tr. 6). Mr. Sims stated that Arthur Murray Studio in Arlington also had a studio in Silver Spring, Maryland and a subsidiary in Bethesda, Maryland. (Tr. 4). In describing the petty cash setup, Mr. Sims stated that receipts were required to account for disbursements from the petty cash. (Tr. 7-8). Studio checks were cashed, and the money would then go into the petty cash box. (Tr. 9). He stated that he and his wife had permission to sign such checks, and that Mrs. Coleman was also given approval for signing such checks. (Tr. 10-11). He admitted that he never reviewed the bank statements from the bank concerning the checks, nor both-

ered to check the receipts concerning petty cash dispersals. (Tr. II, 245-246).

Mr. Sims stated that the studio had Tuesday night champagne parties and "regular staff parties" on Fridays. (Tr. 12). He also stated that generally there were prizes given "and which we had to purchase." (Tr. 14). Although he couldn't estimate what an amount of money would be spent for Tuesday night parties, he approximated that "somewhere around $18.00 to $20.00 was spent on Friday Nights." (Tr. 15-16). He also testified as to additional parties at the studios during the Spring and Fall Festivals. (Tr. 16). There were also other nights when the staff would get together to "make plans for our party, which would be in May, and we would be discussing the parties, the different parties that we were going to hold and then the different meetings which were to be held mostly on a Wednesday night, and that would be mostly with the staff but also some food, some small things were purchased, like things from G.(W). (sic.) Murphy were also purchased . . ." (Tr. 18-19).

Over rigorous objections, which was initially sustained, (Tr. 22-25), Mr. Sims was allowed to testify as to the amount that petty cash expenditures increased (in percentage figures) when Mrs. Coleman became a bookkeeper.[2] According to Mr. Sims, however, after Mrs. Coleman left, the increase in petty cash increased even further to 150 percent. (Tr. 25).

Mr. Sims was then shown a number of receipts attached

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[2] Mr. Sims testified that there was "an increase of over a hundred percent." (Tr. 25).

to carbons of checks representing checks written by Mr. Sims, Mrs. Sims and Barbara Coleman, legally signing Mr. Sims' name, to provide money for the petty cash funds. Mr. Sims then proceeded, through 188 pages of transcript, to review the petty cash receipts, attempting to identify what they were, and in some cases, concluding whether certain receipts were "legitimate" or "illegitimate." (Tr. 31-219). He admitted on cross-examination, however, that he was away from the Arlington Studio most of the time, and never bothered to look at the petty cash receipts. (Tr. 245-246).

Upon his later testimony, Mr. Sims indicated further that the first time he examined the petty cash receipts was with his accountant, when he suspected something was wrong and asked his accountant to bring from Houston the carbons of the checks with the receipts attached. He and the accountant then disassembled the receipts and re-arranged them as to "illegitimate," stapled in front of the checks, and "legitimate," stapled in back of the checks. He repeated the same procedures when reviewing them with the prosecutor, thereby further re-arranging the receipts. (Tr. 483-484).

Mr. Sims' tesimony was eventually followed by the testimony of Mrs. Judy Sims, Lee Sims' wife. She testified that she was an officer of the Arthur Murray's Studio Corporation, i.e. Secretary. (Tr. 323). She described her duties at the school as training the dance instructors, being "responsible for the scenery in the studio . . . and for some 70 or 80 students." (Tr. 339). She testified that the studio had Tuesday night and Friday night parties, (Tr. 340) and in connection therewith food and beverages would be purchased—the food being mainly purchased at Grand Union. (Tr. 341-342). She stated that the champagne was purchased

at the Safeway Store on Wilson Boulevard and other "random places" on Wilson Boulevard. (Tr. 349). She admitted that several of the studio parties were on Saturdays. (Tr. 350). Different staff members would make the different purchases for the studio parties, as well as office and decorations purchases. (Tr. 350-351). In reference to the petitioner, Mrs. Sims stated that Mrs. Coleman ran errands for the studio and used her car to do so. Mrs. Coleman's main errands were to make the bank deposits. (Tr. 352). She also picked up Lee Sims' prescriptions at Peoples Drugs. (Tr. 353). Mrs. Sims testified that she herself made purchases for the studio. (Tr. 353-354).

A number of other witnesses testified for the Commonwealth. Robert Daymde, a Coca Cola route salesman, (Tr. 268), testified that he regularly delivered Cokes to the studio and placed them in a vending machine located in the studio. (Tr. 268-272). He stated that Mrs. Coleman would then pay him for delivering the Coca Cola. (Tr. 272). He identified one of the Coca Cola receipts, previously shown to Mr. Sims, as an example of a paid receipt he would have given to Mrs. Coleman. (Tr. 270).

Six present or former employees of the Arthur Murray Studio in Arlington testified for the Commonwealth. Each of them knew petitioner as the bookkeeper at Arthur Murray Studio. Generally, they testified that they made various purchases for the studio, presented receipts for the purchases and were reimbursed from petty cash by Mrs. Coleman. These witnesses were Charlton G. Bradshaw, Elizabeth Harrison, Gina Viglous, William A. Stufflebeen, Carol Baker and Thomas Snow.

The Commonwealth also presented the testimony of

several persons from stores in the Arlington area, who were shown receipts introduced into evidence from their respective stores. These store representatives, by codes contained on the receipts, were able to identify what the purchased items were. The stores involved were Pier I, Best Products, Hecht Co., and Sears. The items included women's clothing and apparel, (Tr. 421-427) jewelry, (Tr. 417-420) and hardware supplies, (Tr. 505-513).

After the Commonwealth rested its case, the defense moved to strike, based on the insufficiency of the evidence to prove that petitioner had embezzled from her employer. The motion was denied.

The defense presented the testimony of Mr. Jay Haas (sic).[3] Mr. Hawkes testified that he met Mrs. Coleman while both were employed at the Arthur Murray Dance Studio in Arlington (Tr. 514-515), and that she was "the most important support employee of the staff." (Tr. 516). While Mrs. Coleman was still employed at the Arlington Studio, Mr. Hawkes moved to the Silver Spring studio. (Tr. 517). He still maintained connection with the Arlington studio, however, because he "was the director and instructor for all of their activities because we did team-up at parties and contests and we would come in once in a while, we would come in and join them and we would be at the Arlington studio . . . and combine our parties." (Tr. 518). In reference to the Tuesday night parties, Mr. Hawkes stated that "there have been champagne parties on Tuesday night for guests, and they would bring friends for trial lessons, and the students themselves would hold the dance instructions and teach a little bit and do a bit of dancing and lessons them-

[3] His actual name is Jay Hawkes.

selves, and there would be food and champagne to enjoy." (Tr. 520). He also testified that he made various purchases for the studio, such as refreshments, decorations, prizes, supplies, and records. (Tr. 525). He also testified that he was compensated for his gasoline for running errands for the Arthur Murray Studio. (Tr. 523-533).

After resting his case, counsel for petitioner then renewed his motion to strike for insufficient evidence, which motion was denied.

REASONS FOR GRANTING THE WRIT

The decision of the Supreme Court of Virginia upholding petitioner's conviction in this case on evidence clearly insufficient to establish her guilt violates her fundamental rights under the fifth, sixth and fourteenth amendments of the U.S. Constitution.

The trial judge erred in holding that the evidence was sufficient to convict petitioner of grand larceny embezzlement.

The main thrust of the Commonwealth, in its contention that petitioner embezzled petty cash funds of Arthur Murray Studio, was that many receipts covering purchases made from petty cash funds were phony receipts—not representing legitimate purchases connected with the maintenance and operation of the studio. The Commonwealth relied, as its sole source of proof in that regard, on the testimony of Mr. Lee Sims, the President and owner of the Arthur Murray Studio. Mr. Sims, throughout his testimony, did little more than read each receipt shown to him as to the amount of the receipt and identified the store involved. Often he showed that he had no idea what the receipts were

for. For example, Mr. Sims testified in regard to Drug Fair receipts:

> "All right. One, that one is for $11.20; another one for $11.95; another Drug Fair receipt, and this is for—another one which is right after the other one—another one for $8.05. I don't know where it came from."[4] (Tr. 36).

On other receipts, petitioner often merely added that they were illegitimate without any further explanation. In regard to several G. C. Murphy receipts, Mr. Sims was asked by the prosecutor; "Now are all the receipts that are in your hand, you claim them to be invalid?" To which, Mr. Sims replied, "That's correct." At another occasion, in identifying Commonwealth's Exhibit B as being illegitimate, Mr. Sims stated;

> "What is Exhibit B? This is a bad one, and that is about it. There is nothing to indicate what the money was used for. It just says visitor's expenditures." (Tr. 45).

In regard to a Coke machine receipt for Cokes placed in the studio Coke machine, the trial judge asked Mr. Sims why he considered the receipt "bad." Mr. Sims gave the incredible answer that "(T)here is nothing to indicate what it is for, whether it is for business or not." (Tr. 52).

In fact, after the lunch break and before Mr. Sims continued his testimony, the trial judge indicated that Mr. Sims testimony to that point had not proven "any larceny here," because of the conclusionary nature of Mr. Sims' testimony, such as "we don't buy this from Peoples and we did buy

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[4] See also Tr. 40 (Hair Shop); 41 (Grand Union); 44-45 (Drug Fair); 48 (Peoples Drug); 133 (Grand Union).

some, but then there is some crepe paper that was bought." (Tr. 54-55). The judge was also troubled that in some cases not only could Mr. Sims not say with particularity why the receipts were "bad," but he could not identify what some receipts were. The Judge stated:

> "And, for example, here you have 5-F, and you don't know where that was from and—how are you going to say where that is from?" (Tr. 56).

The following colloquy between the prosecutor and the Court then took place:

> MR. MELSON: Well, I can show that the checks were invalid. Now, looking further to the Fourth Circuit, . . . and that is in connection with reasonable evidence which may be admissible to the discrepency of embezzlement, but the evidence will show that the employment is admissible because it is the only way to show the embezzlement until we have all of our witnesses.
>
> THE COURT: Yes, but he is the witness for that and his testimony is not good enough.
>
> MR. MELSON: But that is not the only witness, that is not all of the evidence that I have.
>
> THE COURT: But I don't know, you don't know who the receipts are and all it does is to show and state the amount, so—how are you going to say, what are you going to say about that? (Tr. 57-58).

Despite the Court's misgivings concerning the adequacy of Mr. Sims' testimony, Mr. Sims continued, in his "run-down" of each receipt, to read each receipt, stating in some cases they were "bad" or "illegitimate."[5]

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[5] e.g. Tr. 77-78; Tr. 82:
Q. And what does that indicate on that receipt?
A. I don't know, but . . . is $2.84 and . . . the 5th of June, 1975.

The unreliability of Mr. Sims conclusionary testimony showed through in several ways as the trial developed. First of all, it became clear that Mr. Sims had very little touch with the day to day operation of the Arlington studio, particularly the purchasing of food, beverages and supplies. For instance, when asked by the prosecutor about a Giant Food receipt for $32.96, Mr. Sims responded that "it would be more than we would spend for a party at that particular time and which we would have bought everything." He further added, however, "It is a guess, I know, and I am not even sure that we would shop there, but it would be more than we would spend for one of our parties. (Tr. 156-157). The Court then asked: "How do you know where you

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THE COURT: What is wrong with it?
THE WITNESS: It is on a Saturday.
THE COURT: Well, you don't know?
THE WITNESS: I don't know. (Tr. 105).
Q. Would you go on, please?
A. Yes, (b) Exhibit (b) is $1.55, that is for Lerner's Shop. Do you want me to say it is unauthorized?
THE COURT: You tell me if it is unauthorized.
THE WITNESS: Well, I don't buy ladies apparel or hosiery.
THE COURT: Well, it is hosiery?
THE WITNESS: Well, whatever they sell, whatever they sell at Lerner's Shops, I have no need for it. (Tr. 105).

Also Tr. 128, 133 (Grand Union); 151 (Safeway); Tr. 155:
"Exhibit (m)—well, it looks to me like it might be an illegitimate receipt from Virginia Hardware" . . .
A. Here they are for keys for $2.98, and then there is $3.33, so that would be for doors, or it looks like the whole thing came out to $13.33.
THE COURT: Have you any personal knowledge?
THE WITNESS: I have no personal knowledge.
THE COURT: You have no ideas, none at all?
THE WITNESS: No, none whatsoever. (Tr. 154-155).

Also see Tr. 189, 193, 238.

would shop?'' Mr. Sims responded; ''Well, generally we would shop in the area. I don't know, because the employees, not being—they would go together and pick up whatever I wanted and whatever liquor. Also, they would go to the closest place that they can get.'' (Tr. 157). He admitted he didn't go out to purchase food for the studio and that he did not ''on a regular basis'' purchase other items, such as liquor. (Tr. 229). He also admitted the janitor often went out for studio supplies, and that Mr. Sims didn't know where he went to get them. (Tr. 240). He admitted that he never bothered to review the receipts and daily expenditures from the petty cash fund. He added that ''I never noticed whether there was a problem or not. I was running three schools at the same time.'' He admitted that he was out of the Arlington school most of the time. (Tr. 246).

Secondly, Mr. Sims' testimony concerning studio purchases was contradicted by other witnesses on a number of occasions. For instance, Mr. Sims, in reviewing receipts, particularly involving food and drink purchases, ''disallowed'' such receipts when purchased on Saturdays, or any other day except Tuesdays or Fridays when they had their regular studio parties. For instance, Mr. Sims testified at one point on direct examination:

> ''Well, I would say this is from Safeway, this is a Safeway receipt for $10.96. I would say that was from the 17th of May, that would have been on a Saturday, and we have no reason to have a transaction on a Saturday.'' (Tr. 62).

At another point he stated ''. . . we do not do anything from our business on Saturday.'' (Tr. 73). In reviewing another receipt dated September 13, 1975, Mr. Sims stated, ''Your Honor, again this is on a Saturday—I don't know.'' (Tr.

145). On cross-examination, he stated, ''We do not buy food at Grand Union on Saturday,'' and that as ''a general rule'' no food was bought on Thursday. However, Mr. Sims was then shown a food receipt for Thursday, April 3, 1975, identified by Miss Gina's handwriting as being her purchase. (Tr. 257). Since Miss Gina regularly purchased food for the studio, (Tr. 101-102; 230), Mr. Sims had to accept that receipt as ''legitimate.'' (Tr. 257). He also had to accept as ''legitimate'' another Thursday Grand Union food receipt, since it had his handwriting on it—that receipt was also torn—a factor that seemed to convince Mr. Sims that other receipts were ''illegitimate.'' (Tr. 280-281; 46; 51-52). He was shown another Grand Union food receipt, with Miss Gina's handwriting on it, for Wednesday, April 16, 1975. He had to reconsider it as ''legitimate'' because it had her handwriting on it. (Tr. 281-282). He was then shown another Thursday food receipt (April 10th), and asked whether he considered the receipt to be ''legitimate'' or ''illegitimate.'' He responded, ''I don't have the least idea.'' Another Thursday food receipt was shown to him (April 17th) and he concluded that the receipt was ''borderline.'' (Tr. 282-283).

In regard to Saturday studio purchases that Mr. Sims testified never were made, his wife, Judy Sims, admitted that the studio operated on Saturdays, and that purchases were made if there was a party. (Tr. 350). She denied that the staff would make studio purchases on Saturdays. (Tr. 350). However, Mr. Bradshaw, called as a Commonwealth witness, went much further in his testimony about Saturday purchases. He testified on direct examination that ''there were other times on a Saturday and then sometimes on a Sunday we would usually get together and food would have

to be purchased on a Saturday." (Tr. 387). He also testified about Wednesday parties and D.U. (Destination Unknown) parties on Friday and Saturday nights.[6] (Tr. 402). Mr. Bradshaw's testimony, it is submitted, is particularly reliable since he was an assistant manager under Mr. Sims at the Arlington studio and "purchased everything" for the studio, including liquor, champagne, food, hardware supplies, etc. (Tr. 385-386). Mrs. Elizabeth Harrison, the night receptionist, remembered decorations purchased on Saturdays (Tr. 414); another reliable witness, Gina Viglous (Miss Gina), the person who regularly purchased food and drinks for the studio, testified as to purchases on Saturdays, "because we have some parties there on Saturday." She also admitted, contrary to Judy Sims, that staff rallies took place on Saturdays when beer would be purchased. (Tr. 438). William Stufflebeen, another dance instructor, also testified as to Saturday food purchases for special parties. Tr. 444-445).

On several occasions, Mr. Sims' testimony was inconsistent within itself. At one point he is shown a Peoples Drug receipt, and asked what items the studio would purchase there. He responded that "the main thing that would be purchased would be paper or something like that, and I myself personally would not purchase any of these items. Mrs. Coleman would have made that purchase for me." (Tr. 48-49). At another point, he states that he can't think of anything that would have been purchased from Peoples Drug. (Tr. 53). It was this inconsistency that the Judge commented upon in his remarks to counsel outside the

[6] He also testified about studio picnics and outings for 90 people, and cookouts "in the parking lot." (Tr. 402, 396).

presence of the jury. (Tr. 54). At one point, the prosecutor showed Mr. Sims a particular check made out for petty cash and asked him if his signature was on the check. He said no. He was then asked "about the signature on any of those checks (all of the other numerous petty cash checks in evidence). He stated "not authorized." But when the Court asked him "Are you saying now that you did not authorize your signature to be used?" Mr. Sims quickly admitted that "I would have to say—because I did authorize Mrs. Coleman to go ahead and write my signature." (Tr. 59-60).

Another interesting feature of Mr. Sims testimony, which points out the vague and arbitrary character of the testimony, was his sitting down, first with his accountant and then with the prosecutor, months after Mrs. Coleman had left his employ, to review all the receipts from April 1975, to March 1976, and decide which receipts were "legitimate," "illegitimate," or "borderline." (Tr. 308-310; 483-484). On cross-examination, concerning his "selection process," he was questioned about receipts from Giant Food. It was pointed out to him that some Giant Food receipts were in the "legitimate" pile (stapled to the front of the petty cash check carbons) and others were in the "illegitimate" pile (stapled to the backs of the check carbons). He responded:

> "Yes, some of them are considered good and some of them are considered borderline and some of them are considered impossible."

When asked how could he make these distinctions, he replied:

> "By the amount, the date, the fact that we don't always purchase for parties every week and at much less than the checks have been written two days apart, two days apart on each one of them."

(Tr. 285). This is the "authoritative" testimony from one who was hardly at the Arlington studio, (Tr. 246) who had earlier responded that he wasn't sure whether his employees shopped at Giant (Tr. 156-157), and that he wasn't sure how much was spent for the Tuesday guest parties. (Tr. 14-16).[7]

His wife, Judy Sims, added very little to show that Mrs. Coleman had embezzled the petty cash funds. She admitted she never bothered to look at the petty cash checks with the receipts attached for any irregularities before she signed the checks.[8] (Tr. 332). In fact, incredibly, she testified that she never knew that her husband gave Mrs. Coleman authority to sign his name to checks—which Mrs. Coleman was doing, not only for petty cash checks but for payroll checks —in order to get the employees paid on time. (Tr. 356, Tr. 225-226). Mrs. Sims explained that "whenever we have a bookkeeper, I try as much as possible, I try to stay away from that part and I don't have anything to do with the bookkeeper." (Tr. 356).

As stated in 26 Am Jur 2d, Sec. 48, "the burden of proof at a trial for embezzlement rests, as in other criminal cases, upon the prosecution to establish every material allegation against the defendant beyond a reasonable doubt. . . . The law presumes a defendant on trial to be innocent of an embezzlement alleged, and nothing is presumed or taken by implication against him." (At p. 601). To constitute the statutory crime of embezzlement, it is necessary to prove that an accused wrongfully appropriated *to his own use or*

[7] When asked by the prosecutor what was spent for the parties, he testified that he couldn't "check that because there is no approximate as to the cost." Tr. 15).

[8] Mr. and Mrs. Sims had the authority to sign the studio checks. (Tr. 10).

benefit, with the intent to deprive the owner thereof, the propery of another which has been entrusted to him by reason of his employment or office. (emphasis added). *Revell v Commonwealth,* 215 Va. 708, 213 S.E. 2d 756, 757 (1975); *Webb v Commonwealth,* 204 Va. 24, 34, 129 S.E. 2d 22, 30 (1963); *Lee v Commonwealth,* 200 Va. 233, 235, 236, 105 S.E. 2d 152, 154 (1958). It is submitted that the Commonwealth has failed to prove that petitioner converted petty cash funds to her own use. The Commonwealth has failed to prove that the "illegitimate" or "borderline" receipts were Mrs. Coleman's receipts and that she placed these receipts in the petty cash account to cover up a conversion of the funds. With the exception of two gasoline receipts with her license tags written on the receipts (Tr. 108-110), (Tr. 149), the Commonwealth failed to show that petitioner supplied any of the receipts in evidence. One woman from Discount Drugs testified that she had seen Mrs. Coleman several times in Discount Drugs but thought that it had been recently—within the last four or five months from the date of her testimony (She testified on April 7, 1977). Barbara Coleman had left the employ of Arthur Murray Studio in early March 1976. (Tr. 316, Tr. 5).[9] Furthermore, a great number of the "illegitimate" receipts were food and beverage receipts. Most of those receipts were from Grand Union, the place where employees of Arthur Murray Studio frequently shopped for the studio parties and staff meetings. (Tr. 429, 447). There were also receipts from several grocery stores in the area, including Safeway, A & P, and Giant. Champagne was often bought at both Safeway and Grand Union "and other random

[9] She also testified that Mrs. Coleman was not a regular customer, and had seen her four or five times. (Tr. 317-318).

places on Wilson Boulevard." (Tr. 349, 446). Mr. Bradshaw, the Assistant Manager at the Arlington studio when petitioner worked there, remembered that on Tuesday evenings "between $20.00 and $35.00 would be spent on champagne for the guest parties. He added that "we had pretty good guest parties." (Tr. 386). Mr. Bradshaw further stated that food was bought for Friday night, "sometimes for the staff if we had a get-together," that there were other times "food would have to be purchased on a Saturday," and that during the two promotional times of the year "there was about $50.00 worth of food . . . depending on the size of the party, some $60.00 worth or even $40.00 worth of food." (Tr. 387). He also mentioned going over to a Giant store in the area for ice.[10] (Tr. 398) Miss Gina testified that just for the Tuesday night parties, anywhere from $40.00 to $50.00 would be spent for the food. (Tr. 433). Certainly, all of the grocery receipts determined "illegitimate" by Mr. Sims were consistent with the amount of grocery shopping done by various persons for the studio for their parties, festivals, staff meetings, outings and what-not.

In regard to the Coca Cola receipts, the Commonwealth totally failed to show that these receipts were "illegitimate." The Coca Cola salesman testified that most of the time he would hand Mrs. Coleman a bill for the cases of Coke that he had just placed in the studio Coke machine. She would then pay him the total amount of the bill, assumedly from petty cash, and he would leave the bill with her as the receipt. Most of the time he would not touch the money in the machine, so that, assumedly, Mrs. Coleman would later place

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[10] Mr. Sims admitted there was food bought by the studio from Giant. (Tr. 285).

the money from the Coke machine into the petty cash box. Once in a while, when she was too busy, she would ask him to get the money and bring it to her. He would do so, but what she did with that money, he couldn't say. All he knew was that he was paid what was owed to him. (Tr. 272-273, 276-277). At certain times he would add the rental cost on the bill, and of course the money to pay that had to come out of petty cash. (Tr. 274-275). Certainly, if she were placing the money from the Coke machine into petty cash to reimburse it, and there was no evidence to say she was not, there was no wrongful conversion of money.

There were a number of receipts from G. C. Murphy's. Murphy's was very close to the studio and easily accessible to all of the staff. (Tr. 399, 448-449). It was also clear from the testimony that a variety of items were frequently bought from Murphy's, including office supplies, pencils, pads, prizes, and decorations. Mr. Bradshaw, who now heads up the Bethesda Arthur Murray Studio and has been associated with Arthur Murray as a "dance instructor, director, counselor, and assistant manager" (Tr. 385-386), stated that he "used to decorate the studio, quite frequently, at the ten-cent store (G. C. Murphy) and Hechts." (Tr. 399). Mrs. Elizabeth Harrison remembered that the studio staff bought "streamers of all kinds, all kinds of gimmicks and things like that." She added, "it seems to me that they were always decorating" and that decorations were obtained from various places. (Tr. 413-414). Mr. Stufflebeen purchased door prizes at Murphy's and "all kinds of garbage." (Tr. 448). In view of the above mentioned testimony, it borders on the ridiculous for Mr. Sims to "disallow" receipts from G. C. Murphy—even receipts as small as 73 cents. (Tr. 146-147).

From the testimony of several of the employees, it was

also clear that the petitioner purchased prescribed medicines for Mr. Sims—particularly at Peoples Drug on Wilson Boulevard. Mrs. Sims so stated (Tr. 353) as did Mr. Bradshaw (Tr. 394-395). Although Mr. Sims stated he paid for the drugs out of his pocket, there were a number of drug receipts from Peoples in petty cash. (Tr. 294-295). It should be kept in mind, however, that Mr. Sims also was reimbursed from petty cash for his beers and food at Keyhole Restaurant and Little Dell Restaurant, as well as a personal trip to Forth Worth, Texas. (Tr. 343, 344, 302).[11] Mr. Sims also admitted that paper supplies may have been purchased at Peoples. (Tr. 49).

It is also clear from the testimony that hardware supplies for the maintenance of the studio had to be purchased. Mr. Sims admitted that the janitor would buy maintenance supplies for the studio, and that Mr. Sims didn't know where the janitor went to buy these supplies. (Tr. 240). Initially, Mr. Sims answered, when asked whether there were any receipts from Sears which were authorized, "I would say probably not." In the next breath, however, he admitted that Mr. Stufflebeen went to Sears to buy some supplies. (Tr. 293). He admitted that "at one time" studio floodlights were purchased at Sears. (Tr. 293-294). In fact, the Commonwealth had to withdraw several of the "illegitimate" Sears receipts [12] which reflected studio maintenance supplies. (Tr. 508-510). Such flip-flopping by the Commonwealth as what

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[11] When asked about the trip to Fort Worth, Mr. Sims responded, "I believe I have the right to take money from the corporation." (Tr. 302).

[12] Initially dubbed "illegitimate," of course, by Mr. Sims.

may be legitimate, borderline, or illegitimate receipts shows the tenuous nature of their evidence.[13]

In regard to other receipts from Pier I, Evans Jewelers, and other stores, it was also established in the Commonwealth's case that prizes in connection with studio parties were bought—some expensive and some cheap. Mr. Sims admitted prizes were purchased by the studio and that he sometimes gave checks for their purchase. (Tr. 243-244). He admitted that his wife purchased a door prize at Pier I on one occasion,[14] and that other purchases, particularly a camera and record album were purchased at Evans Jewelers.[15] (Tr. 287). At first hand he denied jewelry was bought, but then when he was shown receipt from the "legitimate" pile for $20.00 for two rings from Steins, next door to the studio, he conceded that the receipt may be "borderline," because it was purchased "right near our victory party." (Tr. 287-288). Mrs. Sims testified that if any of the instructors had a need to purchase jewelry, they would get the money from petty cash. (Tr. 358). Jay Hawkes also mentioned that prizes were bought. (Tr. 525).

There were a number of ABC liquor receipts, most of which were considered by Mr. Sims to be "legitimate." There was abundant testimony that a lot of liquor was bought during the year, particularly on Friday nights. (Tr.

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[13] The prosecutor removed from further consideration one receipt as being "possible" (legitimate). (Tr. 509).

[14] Miss Gina also recalled going to Pier I on one occasion for decorations. (Tr. 435). Mrs. Harrison testified the staff would go to Pier I for studio decorations. (Tr. 414). Pier I was located just behind the studio. (Tr. 383).

[15] Mr. Sims had earlier testified that he had never authorized any purchases from Evans. (Tr. 166-167).

429, 386). Yet Mr. Sims "disallowed" any liquor purchases in D.C., despite the fact that several instructors bought liquor for the studio in D.C.—across Key Bridge,[16] (Tr. 435-436, 468) and Mr. Hawkes and Mr. Bradshaw traveled to Arlington frequently from the Bethesda and Silver Spring studios, and also purchased food and beverages, particularly for the combined parties of the three studios. (Tr. 395, 522-525). Quite possibly the D.C. liquor receipts were theirs, or Mr. and Mrs. Sims, who also traveled in D.C., between the Arlington and Silver Spring studios. (Tr. 295-296; Tr. 337).

There were several receipts from Lerners and Hechts for clothes. Mr. Bradshaw stated that occasionally clothing would be bought for party skits or for the show case. (Tr. 390; 398). Mr. Hawkes also testified about clothes for skits or costume parties, such as the hobo party. He added that when "the holiday time came, there was enough clothes so that we could carry it through." (Tr. 521). Even Mr. Sims mentioned something about the "clothes for my studio." (Tr. 236). Of course, the Commonwealth never precluded the possibility that several of the clothing items, particularly from Hechts and Sears, did not represent personal purchases by Mrs. Sims. The Hecht Company purchases were in Arlington and Silver Spring, where two of the studios are located. (Tr. 421-427). Additionally, Mrs. Sims made the curious statement that "*normally* we (Mr. and Mrs. Sims) don't write anything for our personal business through our corporate account (which includes petty cash). *Normally* that is done through our personal account. (em-

[16] Thomas Snow testified he never purchased the liquor at the Virginia ABC store, but that generally he purchased the liquor in D.C. (Tr. 468).

phasis added.) (Tr. 345). Such testimony implies that occasionally the Sims made personal purchases charged to the corporate account. The Commonwealth never did show those particular receipts to Mrs. Sims for her to deny that they were personal items purchased by her. In addition, both Mr. and Mrs. Sims admitted that the receipts from petty cash were used as a basis for obtaining tax deductions for studio expenses, so that their personal expenditures, included among the genuine business expenditures, would represent a tax benefit. (Tr. 304-305; Tr. 345). Mrs. Sims stated:

> "Well, as far as our corporation is concerned, we may write a check for whatever we choose to and then our accountant at the end of the year does the taxes and he decides what is deductible and what is not. Normally we don't write anything for our personal business through our corporation account. Normally that is done through our personal account." (Tr. 345).

It was also clear that electronic equipment and music (records and tape decks) were purchased at various and sundry locations. (Tr. 386). Mr. Bradshaw testified that he purchased records and sometimes he would buy things for the studio when he was out of the Arlington area. (Tr. 388, 395-396). Mr. Sims, on the other hand, "disallowed" a receipt for the purchase of records because "I don't buy records at Lord and Taylor." (Tr. 187).

In regard to the gasoline receipts, the evidence strongly supported the fact that appellant ran a lot of errands for the studio and Mr. Sims. She made the bank deposits for the studio (Tr. 352); she picked up Mr. Sims' prescriptions at Peoples and his drycleaning; (Tr. 353; 458) and she went to the printers. (Tr. 353). Mr. Bradshaw testified that Mrs.

Coleman ran errands between the Arlington, Bethesda and Silver Spring studios. (Tr. 391-392). Mr. Hawkes testified that many times she helped Mr. Hawkes "solve and clean up" his problems even when he was the dance director at the Silver Spring studio. (Tr. 517-518). Mr. Bradshaw testified that in conversations with petitioner, she felt she was entitled to gas reimbursements "because she did do a lot of traveling back and forth." (Tr. 393). He added that "there were many, many little things that she (petitioner) would be doing on the way by there, on the way to the bank, and she would stop and pick them up or even make an extra trip to pick them up for the studio." (Tr. 394). On re-direct examination by the Commonwealth, Mr. Bradshaw stated that he thought Mrs. Coleman said "she had made some definite arrangements to get a couple of dollars for gasoline. . . ." He testified that she had said at some later point that she is "getting it now" (gasoline reimbursement). (Tr. 403-404).

To lend credence to the fact that Mrs. Coleman was allowed to purchase gasoline to reimburse her use of her own car for studio business, several other employees testified that they were reimbursed for gas for errands run for the studio. Carol Baker testified that Miss Gina received $5.00 extra for going to the store on Fridays. (Tr. 456-457). Mr. Hawkes testified that he received gas money for errands run for the studio. (Tr. 533). In view of all the errands that petitioner did run for Mr. Sims and the studio, it is clear that she was entitled to be reimbursed for her gas. Even if Mr. Sims did not give his approval for such expenditures, it is clear that petitioner was entitled to it. It has been held that the conversion of property under a bona fide claim of ownership is not embezzlement. To constitute embezzlement

there must be a fraudulent intent to deprive the owner of his property. *Wadley v Commonwealth*, 98 Va. 803, 35 S.E. 452 (1900); *Whitlow v Commonwealth*, 184 Va. 910, 37 S.E. 2d 18 (1946). Here, there could be no fraudulent intent, if petitioner felt she was entitled to reimbursement for gasoline for running errands for the studio and her boss. Again, however, it should be stated that petitioner was only positively identified with two gasoline receipts. Whether Mr. or Mrs. Sims or other instructors were responsible for the other gasoline receipts was left open to conjecture.

In view of all of the above, it is submitted that the Commonwealth failed to show that petitioner acted with a fraudulent intent "to deprive the other of his property." A criminal intent has been held to be essential. 26 Am. Jur. 2d, Sec. 19, p. 570. Also the Commonwealth has failed to show a fraudulent conversion of property. 26 Am. Jur. 2d., Sec. 22, p. 572. As indicated before, the Commonwealth has failed to prove that the receipts in evidence were petitioner's. It is clear from the evidence that many of the receipts came from other studio staff members, as well as Mr. and Mrs. Sims. There were many ABC Liquor tabs, but Mrs. Coleman didn't buy the liquor; there were many grocery receipts, but Mrs. Coleman didn't do the grocery shopping; there were several grocery receipts for Saturdays, but Mrs. Coleman didn't work on Saturdays. In fact, Mrs. Coleman left work on weekdays at 5:00 p.m. and was not involved in the running of parties, festivals and the like. (Tr. 224). The Commonwealth tried to show that every receipt came directly to Mrs. Coleman for her to scrutinize. But there was testimony that a number of purchases were made in the evening and receipts were left in envelopes or in Mrs. Colman's desk by the night receptionist. (Tr. 413, 437-438).

Of course, it was not likely that petitioner would question receipts, particularly for personal items, turned over to her by her employers, Mr. and Mrs. Sims.

The Commonwealth has failed also to show that any of the receipts were illegitimate. It is submitted that for Mr. Sims to sort and re-sort receipts as being "legitimate," "illegitimate" or "borderline," based merely on his feelings that a receipt does or doesn't look right is not competent evidence. Most if not all of the receipts were consistent with the running of the studio.

In *Webb v Commonwealth,* 204 Va. 24, 129 S.E. 2d 22, an embezzlement case involving a bookkeeper, this Court stated:

> Where the Commonwealth, in a criminal case, undertakes to prove the guilt of the accused by circumstantial evidence . . . not only must it prove the circumstances, but it must overcome the presumption of innocence and establish his guilt beyond a reasonable doubt. All necessary circumstances proved must be *consistent with guilt and inconsistent with innocence.* It is not sufficient that the evidence create a suspicion of guilt, however strong, or even a probability of guilt, *but must exclude every reasonable hypothesis save that of guilt* . . . at p. 29. (emphasis added).

The Commonwealth never did exclude every reasonable hypothesis of innocence. The grocery, liquor, hardware and supplies purchases could have been legitimate receipts. The few clothing and jewelry items purchased could have been another's, particularly Mrs. Sims; some could have been items for the studio, such as costumes or door prizes. Others were being compensated for running studio errands; why

couldn't petitioner have arranged for compensation for gasoline.[17]

The Commonwealth attempted to show irregularities in the check ledger (Tr. 325-330), apparently to show Mrs. Coleman's intent to cover up her alleged embezzlement. But such irregularities [18] were few and far between, in view of the numerous check entries that were written correctly. (Tr. 364). Such discrepencies had little or nothing to do with any cover-up anyhow, since all petty cash checks and other checks written by Mrs. Coleman were returned from the bank and forwarded to Mr. Sims' accountant. At any rate, "the mere making of false entries in books of account is not sufficient evidence of an act of conversion constituent to the crime of embezzlement, regardless of the defendant's fraudulent intent at the time of making such a false entry. 26 Am. Jur. 2d, Sec 56, at p. 609.[19]

Since the "mental element of the crime of embezzlement is a fraudulent purpose to deprive the owner of his property and to appropriate the same," [20] it is difficult to hold that petitioner had the required intent to embezzle since there was nothing covered up. The receipts were attached to their checks for all the world to see. Some of the receipts even had Barbara Coleman's handwriting on them, identifying what the purchases were. It is difficult to see how a receipt from Posins Bakery with appellant's handwriting describing the

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[17] A staff member was compensated for gasoline for a trip to Allentown, Pennsylvania in connection with studio business. (Tr. 217).

[18] Listing several checks in the ledger differently than the way they were actually written.

[19] See also *State* v. *Heaton,* 56 N.D. 357, 217 N.W. 531.

[20] *Bain* v. *Commonwealth,* 215 Va. 89, 205 S.E. 2d 641 (1974).

receipt as "pigs in a blanket for festival party" could be anything but that.[21]

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Supreme Court of Virginia

Respectfully submitted,

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[21] Mr. Sims dubbed that receipt "illegitimate." (Tr. 300). Although Mrs. Coleman used studio checks to pay for two personal flower deliveries, Mr. Hawkes testified that he had billed several flower purchases to the studio, and then subsequently reimbursed the studio. (Tr. 368-377; 526). There was no evidence offered by the Commonwealth that Mrs. Coleman did not do the same thing.

APPENDIX A

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 23rd day of January, 1978.

The petition of Barbara Coleman for a writ of error to judgments rendered by the Circuit Court of Arlington County on the 25th day of April, 1977, in prosecutions by the Commonwealth against the said petitioner for felonies, having been maturely considered and transcripts of the records of the judgments aforesaid seen and inspected, the court being of opinion that there is no reversible error in the judgments complained of, doth reject said petition and refuse said writ of error, the effect of which is to affirm the judgments of the said court, which court shall allow counsel the sum of $175 as compensation for services rendered if appointed to represent the petitioner on this appeal, and also his necessary direct out-of-pocket expenses.

And it is ordered that the Commonwealth recover of the plaintiff in error the costs to be taxed by the clerk of this court.

Record No. 771172

A Copy,

Teste:

ALLEN L. LUCY, *Clerk*

(s) By: RICHARD R. BRINK
Deputy Clerk

Costs due the Commonwealth
by plaintiff in error in
Supreme Court of Virginia:

Attorney's fee $175.00 plus his costs and expenses

Teste:

ALLEN L. LUCY, *Clerk*

(s) By: RICHARD R. BRINK
Deputy Clerk

APPENDIX B

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 3rd day of March, 1978.

Record No. 771172

BARBARA COLEMAN, *Appellant,*

against

COMMONWEALTH OF VIRGINIA, *Appellee.*

Upon a Petition for Rehearing

On mature consideration of the petition of the appellant to set aside the judgment rendered herein on the 23rd day of January, 1978, and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,
Teste:
ALLEN L. LUCY
Clerk